IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DOUGLAS BRYAN CHASE, Appellant.	No. 32645-1-II UNPUBLISHED OPINION

HOUGHTON, P.J. -- Douglas Chase appeals his convictions of unlawful possession of pseudoephedrine with intent to manufacture methamphetamine and unlawful manufacture of a controlled substance (marijuana). He argues that the evidence is insufficient to support the convictions, an expert witness gave improper opinion testimony on his guilt, and extrinsic evidence affected the jury's verdict. Pro se,[1] he further argues that he received ineffective assistance of counsel. We affirm.

FACTS

On September 1, 2004, 15 to 20 law enforcement officers executed a search warrant at 194 Conifer Road in Kalama. The search warrant was based on an affidavit of probable cause setting forth facts showing that someone was manufacturing methamphetamine in a trailer on the

[1] Chase filed a Statement of Additional Grounds under RAP 10.10.

property.

In the trailer home, the officers discovered various items associated with methamphetamine manufacture, including glass cylinders containing bubbling, reddish-amber liquid on top of a burning woodstove; a set of scales; a Coleman stove; rubber tubing; various glass jars; a mayonnaise jar with a funnel and coffee filters inside; stove fuel; two containers of muriatic acid; a spoon with chemical residue; a Pyrex dish; a bottle of Red Devil Lye; plastic funnels; acetone; coffee filters with oily residue; a quart of sulphuric acid; a gallon of naptha; Heet (methanol); and latex gloves.

Later tests revealed that the scales contained methamphetamine residue and that the glass cylinders atop the woodstove contained pseudoephedrine. Numerous other items contained pseudoephedrine in either a liquid or solid form.

As the officers executed the search warrant, Chase drove up to the property in his Jeep. Scott Badger sat in the passenger seat. Officers placed Chase under arrest.

During a search incident to the arrest, an officer discovered several pieces of mail inside the Jeep, including a current power bill for the 194 Conifer Road property addressed to Chase. Also in the Jeep, the officers found mail addressed to Martha Byrd and Stephanie Thomas at 194 Conifer.

An officer also discovered a cigarette pack between the driver's seat and the driver's side door containing a plastic baggie. The plastic baggie held 22.2 grams of pseudoephedrine in a brownish powder form. Someone had written the mathematical formula for converting cold pills into grams of pseudoephedrine on the baggie. The pseudoephedrine found in Chase's vehicle could yield 11 to 12 grams of methamphetamine.

The officers also seized several books from the master bedroom of the residence, including "Secrets of Methamphetamine Manufacture," "Drugs in Society," "Cannabis Culture," "Hydroponics Questions and Answers for Successful Growing," a Merck Manual, and a chemistry textbook. Also in the master bedroom, the officers found several pieces of mail addressed to Chase at 194 Conifer Road. One was the registration for Chase's Jeep, listing 194 Conifer Road as his residence.

Elsewhere in the residence, they found a book titled "Marijuana Grower's Guide," pipettes, glass pipes, syringes, a high intensity lamp and light bulb, several transformers, potting soil, fertilizer, and a small "bong" (which an officer described as a "smoking device commonly used to smoke a number of things, including drugs"). 2 Report of Proceedings (RP) at 169. The officers found a live marijuana plant on the porch of the residence. No fingerprints were retrieved from the plant container. Forensic testing revealed Scott Badger's and Tenille Burt's [aka Martha Byrd, according to the Statement of Additional Grounds] fingerprints, but not Chase's, on some of the items seized.

By amended information, the State charged Chase with one count of unlawful possession of ephedrine and/or pseudoephedrine with intent to manufacture methamphetamine[2] and one count of unlawful manufacture of a controlled substance (marijuana).[3] A jury heard the matter.

At trial, Jason Dunn, a forensic scientist with the Washington State Patrol Crime Lab, described the methamphetamine manufacturing process. He described two processes, including the phosphorous iodine method and the anhydrous ammonia alkaline metal method. Both

[2] A violation of RCW 69.50.440(1).

[3] A violation of RCW 69.50.401(1).

methods involve the conversion of ephedrine or pseudoephedrine into methamphetamine.

The first stage of both processes extracts ephedrine or pseudoephedrine from cold tablets or some other source. The process requires grinding up tablets, extracting the pseudoephedrine with the use of alcohol, lye or soda, and then using other chemicals to separate the pseudoephedrine from the other cold tablet ingredients. In Dunn's opinion, the first stage of the manufacturing process took place in the trailer. He explained how the evidence found in the trailer could be used for that purpose.

The second stage involves converting pseudoephedrine or ephedrine into methamphetamine and differs depending on which method is used. But none of the substances found in the trailer related to the second stage of processing.

According to the State's expert, southwest Washington methamphetamine manufacturers commonly use the red phosphorous method. Dunn stated that red phosphorous is easily obtained from a common matchbook striker plate.

The prosecutor asked Dunn, "can you conceive of any reason to, um, I don't know, extract pseudoephedrine from cold tablets other than the manufacture of methamphetamine?" 2 RP at 279. Defense counsel did not object to the question. Dunn replied, "There is another controlled substance you can manufacture with it, methcathinone, but other than that, I can't think of a reason." 2 RP at 279. In reply to a follow-up question, Dunn stated he had never heard of a meth lab in Washington that produced methcathinone.

On cross-examination, defense counsel elicited testimony that some individuals use ephedrine directly, rather than converting it into methamphetamine. Defense counsel also elicited testimony on the absence of ingredients essential to complete the manufacture of methamphetamine.

On redirect, the prosecutor asked Dunn whether the absence of evidence of the second stage manufacturing process caused him to change his opinion about methamphetamine being manufactured in the trailer. Dunn replied, "I've analyzed quite a few clandestine drug labs and quite often, you'll often see just this first step. It's not most of the locations, but this does happen quite a bit. Um, I haven't really ever heard of a reasonable reason for extracting pseudoephedrine from tablets other than manufacture of methamphetamine." 2 RP at 310.

Chase objected on the grounds of improper opinion testimony and moved for a mistrial. The trial court overruled the objection and denied his mistrial motion.

In considering the admissibility of the various books found in the residence, the trial court asked, "And what about all the contents of the books? Did you go through some of them? Is there anything listed, found, stuffed in that?" 2 RP at 201. Referring to exhibit 32, defense counsel replied, "In the, um, the book on Secrets of Manufacturing Marijuana, there's a plastic bag [that] appears to have some --." 2 RP at 201. The trial court said, "Appears to have something on the back, check." 2 RP at 202. Defense counsel suggested submitting only the book covers to the jury, to avoid having to "worry about them rummaging through this material." 2 RP at 202. The trial court declined the suggestion and admitted the entire book.

Instead of designating the book as a single exhibit 32, the trial court designated it as three distinct exhibits: the book and two letters found within it. It is not clear whether the plastic baggie was one of the items separately designated.

After the State rested, the trial court again took up the issue of the exhibits. It said, "we looked over all of these and made sure there was nothing else hanging out of them. . . . Or placed in them." 3 RP at 317-18.

The bags holding the exhibits had police evidence tags on them identifying Chase as the "suspect, " "VUCSA"[4] as the "offense, " and the State as the "victim." Exs. 33-42.

Prior to jury deliberations, the prosecutor stated,

> Judge, we should probably talk about redaction of the evidence bags. I don't know if [defense counsel] is interested in that or not. There have been a couple of published Court of Appeal opinions[5] where it's been subsequently raised on appeal that some of the items on evidence bags should not be shown to the jury, um, as some sort of comment on the evidence. So if that's going to be the case, I brought the white out, we can go ahead and take care of those issues if need be. Perhaps it's not an issue.

3 RP at 383.

In response to the trial court's question, "what about marking of the bags or the unmarking?," defense counsel replied, "I looked at the bags and I'm not concerned about the labels in this case." 3 RP at 383. The evidence bags were given to the jury without redaction of their labeling tags.

During deliberations, the jury discovered a matchbook striker plate inside the book, "Secrets of Methamphetamine Manufacture." The jury sent a note to the trial court asking if it could consider it as evidence. The trial court replied, "You may consider all evidence submitted to you." Clerk's Papers (CP) at 36.

The jury convicted Chase on both counts and he appeals.

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[4] Violation of the Uniform Controlled Substances Act.

[5] Actually, two unpublished decisions address this issue. *State v. Connelly*, 2003 Wash. App. LEXIS 3190; *State v. Tennent*, 2003 Wash. App. LEXIS 2793.

ANALYSIS

Sufficiency of the Evidence

Unlawful Possession with Intent to Manufacture Methamphetamine

Chase first challenges the sufficiency of the evidence supporting his conviction of manufacturing methamphetamine. He asserts that the State failed to prove that he intended to make the drug.

Sufficient evidence supports a conviction if, when viewed in the light most favorable to the State, it permits any rational fact finder to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. We leave credibility determinations, issues of conflicting testimony, and persuasiveness of the evidence to the fact finder. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We consider circumstantial and direct evidence equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

To convict Chase of methamphetamine manufacturing here, the State had to prove that he (1) possessed pseudoephedrine and (2) intended to use the pseudoephedrine to manufacture methamphetamine. RCW 69.50.440; *State v. Moles*, 130 Wn. App. 461, 465, 123 P.3d 132 (2005). Manufacture includes "the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly." RCW 69.50.101(p). Possession of pseudoephedrine alone insufficiently supports showing intent to manufacture conviction. *State v. McPherson*, 111 Wn. App. 747, 759, 46 P.3d 284 (2002).

A person acts with intent when he acts with the objective or purpose to accomplish a

result that constitutes a crime. RCW 9A.08.010(1)(a). A person who knowingly plays a role in the manufacturing process can be guilty of manufacturing, even if someone else completes the process. *State v. Davis*, 117 Wn. App. 702, 708, 72 P.3d 1134 (2003).

Chase argues that insufficient evidence supports an inference of his intent to manufacture because the State's witnesses conceded that items essential to complete manufacture of methamphetamine were absent from the trailer. But the State did not have to prove that he actually manufactured methamphetamine or even that he was capable of doing so. Evidence that he was in the process of preparing pseudoephedrine for the first stage of the manufacturing process can sufficiently prove intent to manufacture methamphetamine. *Moles*, 130 Wn. App. at 466 (removal of over 400 cold pills from the blister packs held sufficient to prove possession with intent to manufacture); *compare with State v. Whalen*, 131 Wn. App. 58, 126 P.3d 55 (2005) (shoplifting seven boxes of cold pills containing pseudoephedrine held insufficient to establish prima facie evidence of possession with intent to manufacture).

Chase's possession of the plastic baggie containing 22.2 grams of pseudoephedrine, with a written formula for the amount of pseudoephedrine that could be extracted from cold pills, sufficiently shows that he possessed pseudoephedrine with the intent to manufacture methamphetamine. *See Moles*, 130 Wn. App. at 466.

The evidence found inside the trailer provided additional support for the conviction. An officer found a set of scales containing methamphetamine residue inside the trailer. Numerous other items contained pseudoephedrine extract. Dunn explained how the various chemicals and items found were consistent with the manufacture of methamphetamine and he opined that the complete first stage of the process--extraction of pseudoephedrine--occurred inside the trailer.

Officers also found drug-related paraphernalia and drug-related literature in the trailer. Viewed in the light most favorable to the State, this additional evidence overwhelmingly supports the conviction.

Chase also argues that insufficient evidence links him to the additional evidence found in the trailer. The investigating officers found several pieces of mail addressed to Chase at 194 Conifer Road, including a current power bill that identified him as the power subscriber. Inside the master bedroom, officers found a registration for Chase's Jeep, identifying 194 Conifer Road as his residence. Additionally, the officers found several drug-related books, including the "Secrets of Methamphetamine Manufacture," inside of which was a personal letter addressed to Chase. Viewed in the light most favorable to the State, this evidence more than sufficiently shows that Chase exercised dominion and control over the premises. *See State v. Partin*, 88 Wn.2d 899, 567 P.2d 1136 (1977) (evidence sufficient to prove constructive possession where defendants' numerous personal items, including a payment book for the purchase of the home, were found on the premises); *State v. Davis*, 16 Wn. App. 657, 558 P.2d 263 (1977) (dominion and control may be inferred from payment of rent or possession of keys); *compare with State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986) (evidence insufficient to prove constructive possession where a credit card receipt and traffic ticket found in residence indicated that the defendant resided elsewhere).

Unlawful Manufacture of Marijuana

Chase further contends that insufficient evidence supports his conviction of unlawful manufacture of a controlled substance (marijuana). He asserts that the evidence showed that others lived in the house, any one of whom could have been growing the marijuana found on the

porch.

To prove the crime charged, the State had to show that Chase manufactured marijuana, knowing that it was a controlled substance. As previously discussed, manufacturing broadly includes "the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly." RCW 69.50.101(p).

As discussed above, the jury could reasonably find that Chase had dominion and control over the premises where the evidence was found. Inside the trailer, police officers found the books "Marijuana Grower's Guide," "Drugs in Society," "Cannabis Culture," and "Hydroponics Questions and Answers for Successful Growing." The officers also found a high intensity grow lamp and bulb, an aquarium, fertilizer, several transformers, potting soil, and a "bong." An officer testified that marijuana is typically grown hydroponically, with the aid of indoor grow lights. The officers also found a live marijuana plant on the porch.[6]

Viewed in the light most favorable to the State, the evidence supports reasonable inferences that Chase learned how to grow marijuana from the literature in his possession, he acquired equipment for that purpose, and either he or an accomplice grew the marijuana plant found on his porch. Thus, the evidence sufficiently supports Chase's conviction for unlawful manufacture of marijuana.

Expert Opinion

Chase further contends that Dunn gave improper opinion testimony on guilt. He asserts that the comment violated his constitutional right to a jury trial.

Opinion testimony is that "'based on one's belief or idea rather than on direct knowledge

[6] No fingerprint testing was performed on the container holding the marijuana plant.

of the facts at issue.'" *State v. Demery*, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001) (quoting BLACK'S LAW DICTIONARY 1486 (7th ed. 1999)). Generally, no witness may testify as to his or her opinion on the defendant's guilt, whether directly or inferentially. Such testimony improperly invades the jury's fact-finding role. *State v. Carlin*, 40 Wn. App. 698, 701-02, 700 P.2d 323 (1985), *overruled on other grounds by City of Seattle v. Heatley*, 70 Wn. App. 573, 854 P.2d 658 (1993). But an opinion is not improper merely because it involves ultimate factual issues. ER 704; *Heatley*, 70 Wn. App. at 578-79 (police officer's opinion that defendant was intoxicated and impaired to the extent he could not drive safely was not impermissible opinion testimony, but properly based on the officer's experience and observations).

Chase relies on inapposite cases to support his argument. In *State v. Black*, our Supreme Court held that testimony by a rape crisis counselor that "[t]here is a specific profile for rape victims and [the victim] fits in" was an impermissible opinion on the rape defendant's guilt. 109 Wn.2d 336, 348, 745 P.2d 12 (1987). The court based its decision on the lack of scientific reliability of "rape trauma syndrome" as a means of proving rape. After reviewing the scientific literature, the court concluded the theory lacked adequate foundation. *Black*, 109 Wn.2d at 348.

In *Carlin*, a police officer testified that a police dog tracked the defendant by following a "fresh guilt scent." 40 Wn. App. at 700. Apparently, the dog was trained to literally sniff out people who had a guilty demeanor. The court held that the officer's testimony was an impermissible opinion on guilt.

Black and *Carlin* are distinguishable. Dunn did not give an opinion on an ultimate issue of fact based on an unreliable scientific theory as in *Black*; nor did he directly or indirectly express an opinion about Chase's guilt as in *Carlin*. Contrary to Chase's argument, Dunn did not opine that

"all people who possess ephedrine must also have the intent to manufacture methamphetamine." Appellant's Br. at 18. Dunn merely stated, based on his personal experience and training, that he was not aware of any other purpose for extracting pseudoephedrine from cold pills than as a precursor to manufacture methamphetamine. Dunn did not impermissibly comment on Chase's guilt.

Moreover, Chase was free to dispute Dunn's testimony, and he did so. On cross-examination, he elicited Dunn's admission that some people use ephedrine and pseudoephedrine directly. Chase elicited similar testimony from another officer. The jury was free to independently evaluate whether Chase intended to use the pseudoephedrine itself or as a precursor for methamphetamine. Dunn's testimony did not invade the province of the jury.

Extrinsic Evidence

Matchbook Striker Plate

Chase next argues that the jury's consideration of the matchbook striker plate requires reversal of his conviction of possession of pseudoephedrine with intent to manufacture methamphetamine. He asserts that the matchbook striker plate was extrinsic evidence that prejudiced him by undermining his defense that he intended to use pseudoephedrine by itself, not as a precursor to methamphetamine manufacture.

The State submits a concession based on *State v. Pete*, 152 Wn.2d 546, 98 P.3d 803 (2004). In explaining its concession, the State notes, "This piece of evidence changed the entire tenor of Appellant's case, as one of the central themes during the trial was that the State did not have all the required ingredients for a fully functional methamphetamine lab." Resp't's Br. at 16.

We decline to accept the State's concession. *See In re Pers. Restraint of Goodwin*, 146

Wn.2d 861, 875, 50 P.3d 618 (2002) (reviewing court is not bound by an erroneous concession of legal error). Even if the matchbook striker plate was extrinsic evidence, the jury's consideration of it did not prejudice Chase because there is no reasonable possibility that it affected the jury verdict.

A jury's consideration of extrinsic evidence may require reversal of its verdict. *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). Extrinsic evidence is "information that is outside all the evidence admitted at trial." *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990). This type of evidence is improper because it is not subject to objection, cross-examination, rebuttal, or explanation. *Pete*, 152 Wn.2d at 553.

But even assuming that the jury's consideration of the matchbook striker plate was improper,[7] the error was harmless. A jury's consideration of extrinsic evidence does not require

[7] We note that this case is dissimilar from others involving extrinsic evidence in that the matchbook striker plate was not interjected into the jury's deliberations as a result of misconduct by either the bailiff or a juror but was part of properly admitted evidence. *Compare with Pete*, 152 Wn.2d 346 (bailiff gave jury exhibits ruled admissible but not actually admitted into evidence); *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 750 P.2d 1257, 756 P.2d 142 (1988) (bailiff gave jury dictionary jurors used to define "negligence" and "proximate cause"); *Lockwood v. A C & S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987) (juror independently investigated defendants' financial resources); *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 668 P.2d 571 (1983) (juror made an unauthorized visit to the scene of an accident); *Halverson v. Anderson*, 82 Wn.2d 746, 513 P.2d 827 (1973) (juror interjected outside evidence on typical earnings for airline pilots and surveyors); *State v. Rinkes*, 70 Wn.2d 854, 425 P.2d 658 (1967) (bailiff gave jury newspaper editorial expressing public dissatisfaction with leniency in the criminal justice system); *State v. Burke*, 124 Wash. 632, 215 P. 31 (1923) (bailiff gave jury magnifying glass for inspecting and discovering additional incriminating evidence on exhibits); *State v. Boling*, 131 Wn. App. 329, 127 P.3d 740 (2006) (juror did internet research on possible alternative causes of death).

Arguably, the jurors did not go "outside the evidence" when they examined the book and discovered the matchbook striker plate inside. They merely examined the contents of the book more thoroughly than either of the parties did. *See State v. Everson*, 166 Wash. 534, 536-37, 7 P.2d 603 (1932) (a jury may properly make "a more critical examination of an exhibit than had been made of it in the court.").

reversal when there is no reasonable possibility that it affected the verdict. *Pete*, 152 Wn.2d at 555 n.4.

The State's concession seems to be based on the assumption that reversal is required whenever extrinsic evidence undercuts the defense theory. But the question is not whether the extrinsic evidence is adverse to the defendant but, rather, whether there are reasonable grounds to believe it affected the jury's verdict. To answer this question, we must make an objective inquiry into whether the extrinsic evidence could have affected the jury's verdict, not a subjective inquiry into its actual effect. *Richards*, 59 Wn. App. at 273 (citing *Halverson v. Anderson*, 82 Wn.2d 82 Wn.2d 746, 746, 513 P.2d 827 (1973)). We evaluate the extrinsic evidence in light of all the facts and circumstances of the trial. *State v. Tigano*, 63 Wn. App. 336, 342, 818 P.2d 1369 (1991). The jury's consideration of extrinsic evidence does not require reversal if we are satisfied beyond a reasonable doubt that it did not contribute to the verdict. *State v. Boling*, 131 Wn. App. 329, 333, 127 P.3d 740 (2006).

The jury's consideration of the matchbook striker plate did not prejudice Chase because it was cumulative of abundant evidence of his intent to manufacture methamphetamine. Extrinsic evidence does not require reversal if it is merely cumulative of properly admitted evidence. *See Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 198, 668 P.2d 571 (1983) (juror's improper visit to the accident scene did not require reversal where the juror's personal observations were cumulative of numerous photographic exhibits properly admitted into evidence); *State v. Lemieux*, 75 Wn.2d 89, 90-91, 448 P.2d 943 (1968) (witness's improper ex parte comments to the jury that he was the one who gave the police key evidence did not require

a new trial because it was cumulative of his testimony).

Officers discovered Chase in possession of 22.2 grams of pseudoephedrine powder and the formula for extracting pseudoephedrine from cold pills. When officers entered his residence, they found two cylinders of liquid containing pseudoephedrine bubbling on the lit woodstove. An expert explained that the first stage of the methamphetamine manufacturing process occurred inside the residence.

Furthermore, the police found methamphetamine residue on a set of scales inside the residence. There were numerous books containing instructions on the methamphetamine cooking process, including the "Secrets of Methamphetamine Manufacture." As one expert testified, the manufacturing process requires two steps, the officers discovering the first. Given these facts, there is no reasonable possibility that the jury's consideration of the matchbook striker plate affected the jury's verdict.

Moreover, the matchbook striker plate would have been admissible as relevant, probative evidence. *See Tigano*, 63 Wn. App. at 343 (defendant not prejudiced by juror's failure to make truthful disclosures during voir dire because full and correct responses would not have provided actual cause to excuse for bias). Chase relies on *Pete* for the proposition that extrinsic evidence that would have been admissible is nonetheless prejudicial when the defendant has no opportunity for objection, cross-examination, rebuttal, or explanation.

Pete involved a defendant accused of participating in a robbery outside a convenience store. The jury inadvertently received two documents. The first was the defendant's sworn statement to police in which he admitted being at the scene and interacting with the victim, but denied any wrongdoing. The second was a police report recording the victim's statement soon

after the crime in which he unequivocally identified Pete as an assailant. The State did not present either document, although the court had ruled them admissible.

At trial, Pete's defense was a general denial of involvement. The victim's testimony was equivocal: he did not clearly recall the events of that night. Our Supreme Court held that the jury's consideration of the extrinsic evidence prejudiced Pete by undermining his defense, requiring a new trial. The court held that whether the evidence was admissible was irrelevant, because Pete had no opportunity to challenge it through objection, cross-examination, rebuttal, or explanation. *Pete*, 152 Wn.2d at 555.

Pete's facts are distinguishable. Pete could have challenged the police report as violative of his constitutional right against compelled self-incrimination. Similarly, Pete could have challenged the victim's statement as inadmissible hearsay. Through cross-examination, Pete could have demonstrated inconsistencies between the statement and the victim's testimony. The victim's statement was highly prejudicial because, at trial, the victim no longer recalled events clearly.

In contrast to the situation in *Pete*, where the extrinsic evidence was more inculpatory than evidence actually admitted, the matchbook striker plate was a relatively insignificant piece of evidence in view of the totality of the evidence presented pointing to Chase's intent to manufacture methamphetamine. Moreover, unlike in *Pete*, Chase had before the jury a rebuttal argument applicable to the matchbook striker plate: that it was an item with many innocent household purposes that only coincidentally can also be used in the manufacture of methamphetamine. The jury's consideration of the matchbook striker plate does not require reversal of Chase's conviction because there is no reasonable possibility that it affected the

verdict.

Evidence Tags

Chase next contends that the tags on the evidence bags, indicating the crime charged and identifying him as the suspect, also constitute impermissible extrinsic evidence of his guilt.

In *State v. Velasquez*, 67 Wn.2d 138, 143, 406 P.2d 772 (1965), our Supreme Court stated, "The practice of leaving anything on the exhibit except the court's identifying marker is not recommended; and the better practice in this case would have been to remove the sheriff's identification tags." The court concluded, however, that the error, if any, was harmless because the tags had "no probative effect" in view of a cautionary instruction together with abundant evidence of guilt. *Velasquez*, 67 Wn.2d at 143.

Initially, we note that the invited error doctrine could preclude review of this issue. Under the doctrine of invited error, a defendant may not set up an error at trial and complain about it on appeal. *City of Seattle v. Patu*, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002). The doctrine of invited error applies even to errors of constitutional magnitude otherwise reviewable for the first time on appeal under RAP 2.5. *State v. Henderson*, 114 Wn.2d 867, 869-70, 792 P.2d 514 (1990).

Before jury deliberations, the prosecutor offered to redact any objectionable information on the evidence tags, and even brought white out for that purpose. 3 RP at 383. When asked to reply, defense counsel responded, "I looked at the bags and I'm not concerned about the labels in this case." 3 RP at 383. If presenting the jurors with the unredacted evidence tags was error, it was invited error and, thus, is not reviewable.

But even if the invited error doctrine did not preclude review, and even assuming the court

erred in permitting the jury to review the evidence tags, the error was harmless. The information on the bags merely identified Chase as the suspect and the offense as VUCSA. This is cumulative of information properly before the jury. Chase fails to show how the information on the evidence tags prejudiced him in light of the overwhelming evidence of his guilt. There is no reasonable possibility that the jury's observation of the evidence tags affected its verdict. As in *Velasquez*, the evidence bags had no probative effect, and thus the error, if any, was harmless.[8]

Ineffective Assistance of Counsel

In his Statement of Additional Grounds (SAG), Chase argues that he received ineffective assistance of counsel. He asserts that his attorney failed to: (1) return phone calls; (2) request a CrR 3.5 hearing; (3) require the State to present testimony by Martha Byrd (the woman who gave police probable cause to obtain the search warrant); (4) require the State to disclose that Byrd's fingerprints were found on the jars containing pseudoephedrine; (5) challenge the State's failure to test items for the presence of ephedrine or to prove the absence of methamphetamine on the items; and (6) object to the State's destruction of some of the items recovered.

The state and federal constitutions guarantee a defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To prevail in an ineffective assistance claim, a defendant must show both deficient performance and resulting prejudice. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). To establish deficient performance, a defendant must show that his attorney's performance fell below an objective

[8] But we cannot conclude without noting that the better practice is to remove the tags before sending the evidence to the jury room.

standard of reasonableness. *McNeal*, 145 Wn.2d at 362. To establish prejudice, a defendant must demonstrate that, but for the deficient representation, the outcome of the trial would have differed. *McNeal*, 145 Wn.2d at 362. We presume that the defendant received adequate representation. *Strickland*, 466 U.S. at 689; *McFarland*, 127 Wn.2d at 335. If defense counsel's performance can be characterized as a legitimate trial strategy or tactic, an ineffective assistance claim fails. *McNeal*, 145 Wn.2d at 362.

Chase's ineffective assistance claim lacks merit. The record shows that his attorney provided skillful and zealous advocacy, was well informed about the applicable law and the State's evidence, effectively cross-examined witnesses, made timely and well-reasoned objections, gave a powerful closing argument that highlighted weaknesses in the State's case, and held the State firmly to its burden of proof.

The record does not support Chase's claim that his attorney failed to confer with him or that he was prejudiced as a result. Chase complains that defense counsel forfeited his right to a CrR 3.5 hearing without his consent. There was no CrR 3.5 hearing because the State did not offer into evidence incriminating statements that Chase made to investigating officers. Failing to challenge evidence that the State did not present does not constitute deficient performance.

Chase claims his attorney failed to force the State to present Martha Byrd as a witness so that he could cross-examine her. Although Byrd supplied the probable cause information in support of the search warrant, she was not a witness at trial. The State attempted to secure her presence, but no one could locate her. The jury was aware that Byrd received letters addressed to her at 194 Conifer Road and that her fingerprints and those of another (not Chase) were found on items in the trailer. Chase fails to show how Byrd's absence from the trial prejudiced him. Also,

there is nothing in the record to show what Byrd would have testified to.

Next, Chase claims his attorney was deficient in not challenging the State's failure to test all the items in the trailer for the presence of pseudoephedrine. He argues that this evidence could support his theory that he used it as an end product, not as a precursor for methamphetamine.

The State tested some, but not all, of the evidence for the presence of ephedrine and methamphetamine. Detectives explained that they did not test each item because they felt they had enough evidence. The State's witnesses testified that one of the items (the scales) contained a trace of methamphetamine and that several of the items contained ephedrine. Chase fails to explain how further verification of the presence of ephedrine or the absence of methamphetamine would have assisted his defense. And defense counsel forcefully argued that Chase intended to use pseudoephedrine as an end product.

Finally, Chase claims that his counsel failed to object when the State destroyed evidence. At trial, one of the State's witnesses testified that some of the evidence collected was destroyed as hazardous, in accordance with protocols relating to the cleanup of methamphetamine labs. Chase asks us to speculate that items destroyed by the State following its investigation would have exculpated him. *See McFarland*, 127 Wn.2d at 336 (speculation or conjecture is not enough). We decline to do so.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Houghton, P.J.

We concur:

Bridgewater, J.

Penoyar, J.